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ARTICLES

SEPARATE AND OBEDIENT: THE JUDICIAL QUALIFICATION MISSING FROM THE JOB DESCRIPTION

J. AMY DILLARD¹

*"We must make certain that no judge is ever influenced in deciding a case by the threat of being turned out of office because the decision, while made in good faith, differs from the way those responsible for the judge's retention might think it should have been decided."*²

I. INTRODUCTION

The national debate about the role of judges, their qualifications and ideologies consumes news coverage, as evidenced by the recent appointment hearings of Chief Justice John Roberts and Justice Samuel Alito and the aborted nomination of Harriet Miers. The American Bar Association is in the process of re-evaluating and updating its Model Code of Judicial Conduct.³ The poverty of the quality of the debate, with legislators on both sides of the aisle discussing a few political issues and largely ignoring issues of ethics and temperament, leaves the public with little helpful information about whether judicial candidates will abide by the Canons of Judicial Ethics,⁴ which may be the most reliable and pertinent standards

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² Symposium, *A Call to Arms: The Need to Protect The Independence of the Judiciary*, 38 U. RICH. L. REV. 575, 577 (2004).

³ See American Bar Association-Joint Commission to Evaluate the Model Code of Judicial Conduct, <http://www.abanet.org/judicialethics/> (last visited Oct. 17, 2007).

⁴ See American Bar Association-Model Code of Judicial Conduct 2004 Edition, <http://www.abanet.org/cpr/mcjc/toc.html> (last visited Oct. 18, 2007); Virginia's

for evaluating judicial temperament and aptitude. Legislators demonstrate discomfort with the power of judges, and they boldly seek to limit the power of the judiciary and to circumscribe the offices of Article III judges.⁵ Congress has at least threatened legislation to impeach judges, create term-limits, and reduce the number of appeals judges.⁶ Despite the rhetoric to abandon the use of a litmus test for judicial candidates, it remains apparent on the federal stage that legislators are, even if subconsciously, using one.

In Virginia, legislators openly apply a litmus test in the selection and reappointment processes for judges. With absolute control over the selection and reappointment process for all judges in the Commonwealth, members of the Virginia General Assembly, in session with no oral or written record and no method for capturing legislative history, increasingly ask pointed ideological questions to scrutinize judges who are carrying out their jobs ethically, in accordance with the law, and with courage. Virginia's original constitution granted control of the judiciary to its General Assembly.⁷ Throughout the 19th century, during two significant revisions of the Virginia Constitution, the General Assembly retained its complete control over the selection and reappointment of every judge in the Commonwealth.⁸ Today, the General Assembly maintains absolute control of the Commonwealth's Judiciary.⁹ As recently as

Judicial System, Section III: Canons of Judicial Conduct for the Commonwealth of Virginia, http://www.courts.state.va.us/jirc/canons_112398.html (last visited Oct. 17, 2007).

⁵ Joan Biskupic, *Hill Republicans Target 'Judicial Activism'; Conservatives Block Nominations, Threaten Impeachment and Term Limits*, WASH. POST, Sept. 14, 1997, at A01 (noting that Republicans in the 104th and 105th Congress made at least seven attempts at amending the Constitution to create term limits and a mandatory reappointment process for federal judges).

⁶ *Id.*

⁷ VA. CONST. (1776) ("The two Houses of Assembly shall, by joint ballot, appoint Judges of the Supreme Court of Appeals, and General Court, Judges in Chancery . . .").

⁸ Alex B. Long, *An Historical Perspective on Judicial Selection Methods in Virginia and West Virginia*, 18 J.L. & POL. 691, 715-16, 750-51 (2002). In 1815, the Commonwealth adopted a significantly revised Constitution wherein the General Assembly ceded control over appointing the governor to direct popular election. *Id.* After the Civil War, Congress required Virginia to create a new Constitution as a condition of readmission to the Union. *Id.* Virginia bucked the trend among the states towards an elected judiciary, and the General Assembly held tightly to its exclusive control over all members of the bench. *Id.*

⁹ VA. CONST. art. VI, § 7 ("The justices of the Supreme Court shall be chosen by the vote of a majority of the members elected to each house of the General Assembly for terms of twelve years. The judges of all other courts of record shall be chosen by the vote of a majority of the members elected to each house of the General Assembly for terms of eight years.").

1970, the Commonwealth reviewed and retained her unique practice of granting absolute control over the judiciary to the General Assembly.¹⁰

The problem of selecting and applying a litmus test is not exclusive to Virginia, but the unique appointment process creates a vortex of power for legislators to disable judges who take unpopular stands. If the point of appointing judges is to free them from populist criticism at the ballot box, then Virginia has not accomplished her goal. In fact, legislators confront judges in closed hearings with no transcript for their constituents, thus making it easier to confront judges with frank and base political criticism, bypassing the need for true assessment of performance and criteria based on judicial ethics, ability, and temperament.

The General Assembly maintains no legislative history or record of its proceedings.¹¹ The history and process of judicial selection are entirely secret in Virginia, save for a few tenacious reporters' recollections. Accordingly, the data for this article is generally ephemeral, comprising newspaper articles and interviews with judges and other direct participants. Though my methodology is somewhat unconventional, it is the only approach I have discovered to obtain the information.

In Part One, I will examine the history of the selection and reappointment process and the procedure used by the General Assembly. I will survey the recent history of increased politicization of the judicial selection and reappointment processes. In Part Two, I will offer an overview of Virginia's Canons of Judicial Ethics and will show how the Canons governing judicial ethics are a universal guide in assessing judges. I will explain the role of the Judicial Inquiry and Review Commission (JIRC) and the transparency of using complaints made to, and decisions rendered by, the Commission in assessing whether a sitting judge should be reappointed, rather than secret and naked ideological questioning based on a political litmus test.¹² In Part Three, I will examine three case studies of highly qualified judges who experienced the ritual humiliation and intimidation of a litmus test reappointment process. Each judge rendered a decision or a dissent that was well within the bounds of the statutory and common law of Virginia. Each com-

¹⁰ A.E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 739-46 (1974). "The Commission on Constitutional Revision considered alternative plans [of judicial selection] The Commission saw no advantage to those plans over the method of judicial selection in Virginia." *Id.* at 742.

¹¹ See Virginia Division of Legislative Services-Legislative Reference Center, <http://dls.state.va.us/lrc/leghist.htm> (last visited Oct. 17, 2007).

¹² See VA. CODE ANN. § 17.1-901 (West 2007).

plied with the requirements of the Canons and would not have been subject to JIRC review for misconduct.

This is a longstanding problem in Virginia that I am identifying, and solutions are not simple. I will conclude by offering a solution to stop the emergence of the litmus test and establish a review method for reappointment that requires the General Assembly to determine (1) whether a judge has engaged in misconduct resulting in an investigation or reprimand by JIRC; and (2) whether the judge has acted within the boundaries set by the Canons. While many scholars examine what philosophies a judge should ascribe to, few examine the mechanics of judicial qualification, even in the aftermath of the aborted Harriet Miers nomination. The impoverished national debate of what it means to be a good judge may start with this examination of the laboratory that is Virginia, one based on the absolute control of the legislature in judicial selection.

II. PROCESS FOR SELECTION AND REAPPOINTMENT, JUDICIAL RETIREMENT, AND RECENT POLITICIZATION OF THE PROCESS

A. Legislative Control Over Appointment and Reappointment of Judges

In Virginia, members of the General Assembly make appointments to the judiciary.¹³ Virginia is the only state that retains a method of judicial selection by strict legislative appointment.¹⁴ This method, as suggested by some critics, may prove advantageous by overcoming the problem of voter apathy and offering an indirect legislator check.¹⁵ Legislative appointment determines who will fill vacancies in the Commonwealth's Supreme Court, Court of Appeals, Circuit Courts, and the General District Courts.¹⁶

¹³ VA. CONST. art. VI, § 7 ("The justices of the Supreme Court shall be chosen by the vote of a majority of the members elected to each house of the General Assembly for terms of twelve years. The judges of all other courts of record shall be chosen by the vote of a majority of the members elected to each house of the General Assembly for terms of eight years Upon election by the General Assembly, a new justice shall begin service of a full term.").

¹⁴ See Judicial Selection Report-Chapter 4, <http://www.cga.ct.gov/pri/archives/2000jsreportchap4.htm> (last visited Oct. 17, 2007) (outlining several states' various methods of judicial selection and highlighting the Commonwealth of Virginia as the sole body to which the legislature nominates and elects its judges).

¹⁵ See, e.g., The League of Women Voters of Michigan: LWVMI Judicial Study 2002, <http://www.lwvmi.org/shared/judicialstudy2002.html> (last visited Oct. 18, 2007) (providing the example that a voter may choose not to vote for her legislator if she disapproves of the performance of the judge selected by her legislator).

¹⁶ VA. CONST. art. VI, § 7.

Established in 2000, the Joint Judicial Advisory Committee offers advice to the General Assembly on the qualifications of judges.¹⁷ Both lawyers and laypersons compose the fourteen-member committee. The group conducts interviews of potential candidates and seeks input from state and local bar associations, civic groups, and citizens.¹⁸ After these organizations submit nominations and remarks about candidates to the committee, the committee evaluates the recommendations. In addition, several Republican legislators have created local citizen commissions to screen nominees for both Circuit and District Court judgeships.¹⁹ The committee then submits its findings to the House and Senate for consideration.²⁰

Virginia's judicial appointment scheme does not violate the Federal Constitution's doctrine of separation of powers even though it vests in the legislature absolute control over the judiciary.²¹ The separation of powers principle derives from the first three articles of the United States Constitution which vests each of the three branches of the United States government with their re-

¹⁷ See LaToya Gray, *Virginia's Judicial Selection Process*, 9 J. OF THE AM. SOC'Y OF LEGIS. CLERKS & SECRETARIES 2, 14 (2003), available at <http://www.ncsl.org/programs/legismgt/ascls/jrnFall03.pdf>; *GOP Forms Judges Panel*, RICHMOND TIMES DISPATCH, Jan. 11, 2000, at B-4 (stating that the Republicans established this committee after the 1999 Republican gain of the majority in both the House and the Senate); see also *Judge Picking: Toward Merit-Selection; GOP Reformers Want a Better Appointment Process-Stressing Qualifications*, VIRGINIAN-PILOT, Jan. 15, 2000, at B6 (noting the Republicans' desire to form a committee in order to examine judges' qualifications).

¹⁸ See, e.g., Virginia Women Attorney's Association-Judicial Screening Process, <http://www.vwaa.org/judicial.htm> (last visited Oct. 17, 2007) (giving an overview of the VWAA Judiciary Committee in judicial appointments in Virginia). The VWAA Judicial Committee gathers and disseminates information to its members and to the public about potential candidates for state and federal judgeships in the Commonwealth. *Id.* The Committee then gathers information from the candidate through interviews and references and offers recommendations about candidate positions and philosophies. *Id.* The Committee meets with this information and submits recommendations to the Board of Directors, who may choose to endorse the candidate through a two-thirds majority vote. *Id.* The endorsements are then sent to the applicable legislative appointing body. *Id.*

¹⁹ See Gray, *supra* note 17, at 15 (last visited Oct. 17, 2007) (citing Judicial Selection in Virginia: An Introduction, <http://www.ajs.org/js/VA.htm>).

²⁰ Judicial Selection in Virginia: An Introduction, <http://www.ajs.org/js/VA.htm> (last visited October 17, 2007).

²¹ See U.S. Const. art. I, § 1 (bestowing the legislative powers on Congress, which consists of the Senate and the House of Representatives); see also U.S. Const. art. II, § 1 (vesting the executive power of the United States in the President); U.S. Const. art. III, § 1 (conferring the judicial power of the United States in one Supreme Court and inferior courts as established by Congress).

spective powers.²² However, the U.S. Constitution does not dictate a particular plan for the states' internal distribution of governmental powers.²³ Furthermore, the U.S. Supreme Court has held that the separation of powers concept, although essential to the U.S. Constitution, is not mandatory in state governments.²⁴

Although the Virginia Constitution also upholds a tripartite arrangement of the state government, Virginia's judicial appointment scheme most likely does not violate its Constitution's separation of powers doctrine.²⁵ In the past, when confronted with an allegation that a statute or an activity by a government department may violate this separation of powers principle, the Virginia Supreme Court has applied the "whole power" doctrine.²⁶ The Court has held that no Article III violation exists where the "whole power" doctrine has not been violated.²⁷ Virginia has relied on the "whole power" doctrine to justify the legislative branch's encroachment upon the executive branch²⁸ and the executive branch's encroachment upon the judiciary.²⁹

²² See U.S. CONST. art. I-III.

²³ See *Mayor of Philadelphia v. Educ. Equal. League*, 415 U.S. 605, 615 n.13 (1974) (noting that the Federal Constitution "does not impose on the States any particular plan for the distribution of governmental powers").

²⁴ See *Sweezy v. N.H.*, 354 U.S. 234, 255 (1957).

²⁵ See VA. CONST. art. III, § 1 ("The legislative, executive, and judicial departments shall be separate and distinct, so that none exercise the powers properly belonging to the others, nor any person exercise the power of more than one of them at the same time . . .").

²⁶ See *Winchester & Strasburg R.R. Co. v. Commonwealth*, 55 S.E. 692, 694 (Va. 1906) (explaining that the meaning of the whole power doctrine is "that the whole power of one of these departments should not be exercised by the same hands which possess the whole power of either of the other departments").

²⁷ *Id.* at 693-94 (contending that it is possible for some of the powers of the three branches to be united without violating the Constitution).

²⁸ See *Baliles v. Mazur*, 297 S.E.2d 695, 700-01 (Va. 1982) (upholding a Virginia statute empowering the General Assembly to authorize or reject projects proposed by the Virginia Public Building Authority, which is under the authority of the executive branch); see also *NAACP v. Comm. on Offenses Against the Admin. of Justice*, 101 S.E.2d 631, 635, 640 (Va. 1958), *vacated*, 358 U.S. 40 (1958) (purporting that the legislative department can properly investigate the manner and result of law enforcement and execution by the executive branch).

²⁹ See *Tross v. Commonwealth*, 464 S.E.2d 523, 530-31 (Va. Ct. App. 1995) (stating that judicial intake officers, who are executive officers, do not exercise the whole power of the judiciary when these officers determine whether sufficient probable cause exists to authorize petitions charging criminal offenses during the Virginia juvenile intake process).

B. Judicial Selection and Reappointment Process Used by the Legislature

The justices of the Supreme Court shall be chosen by the vote of a majority of the members elected to each house of the General Assembly for terms of twelve years. The judges of all other courts of record shall be chosen by the vote of a majority of the members elected to each house of the General Assembly for terms of eight years. . . . Upon election by the General Assembly, a new justice shall begin service of a full term.³⁰

For reappointment, a judge must interview with a legislative committee and subsequently receive a majority vote in the legislature.³¹ All Virginia Supreme Court, Court of Appeals, Circuit Court, and General District Court judges are subject to this process.³² Members of the legislature became concerned that the legislature did not have the faculties to adequately review members of the judiciary.³³ The legislature attributed this to its members' part-time nature and the diminishing number of practicing attorneys.³⁴ In response, H.B. 2445, enacted during the General Assembly's 2001 session, established a pilot program for local judicial review and nominations.³⁵ Under H.B. 2445, judges are evaluated in the year before their term expires.³⁶ The evaluations serve two purposes: first, as a method of informing professional development for judges, and second, as an information source for reappointment purposes.³⁷

³⁰ See VA. CONST. art. VI, § 7.

³¹ Judicial Selection in the States: Virginia-Current Methods of Judicial Selection, http://www.ajs.org/js/va_methods.htm (last visited Oct. 17, 2007) (explaining that the Courts of Justice Committees of the House of Delegates and the Senate interview candidates who seek reelection, and these candidates are then voted on by both full houses).

³² See *id.* (explaining that all judges are subject to the interview process prior to the election and reelection process).

³³ See H.R.J. Res. 212, Gen. Assem., Reg. Sess. (Va. 2000), available at <http://leg1.state.va.us/cgi-bin/legp504.exe?001+ful+HJ212ER+pdf> (establishing a task force to design a judicial performance evaluation program).

³⁴ See *id.* Membership in the Virginia General Assembly is not full-time employment, as the General Assembly meets for only thirty days in odd-numbered years and sixty days in even numbered years. See VA. CONST. art. IV, § 6. See VA. CONST. art. IV, § 6.

³⁵ H.R. 2445, Gen. Assem., Reg. Sess. (Va. 2001), available at <http://leg1.state.va.us/cgi-bin/legp504.exe?011+ful+HB2445+pdf>.

³⁶ *Id.* (mandating that the report of the judge's evaluation shall be transmitted to the clerks of the House and Senate).

³⁷ *Id.* See also H.R.J. Res. 212.

C. Judicial Retirement

The General Assembly creates a structural incentive to serve as a judge, hoping to attract potential candidates to reappointment by offering a well-pronounced financial reward. The most highly qualified members of the Virginia Bar generally earn significantly more money than their judicial counterparts on the bench. Beyond the honor and duty of serving on the bench, the retirement benefit may be the only financial incentive that a successful practicing lawyer would lose out on by not becoming a judge who is a public servant at a much-reduced salary.

The General Assembly enacts and enforces laws stipulating the conditions, duties, and compensation concerning the retirement of judges and justices.³⁸ The General Assembly granted the Board of Trustees of the Virginia Retirement System (VRS) authority to administer the Judicial Retirement System, which regulates the compensation awarded to retiring judges.³⁹

Through VRS, judges acquire eligibility for unreduced retirement benefits based on age at retirement and years of service.⁴⁰ VRS sets the retirement benefit based on an average of the thirty-six months of highest salary.⁴¹ If the General Assembly appointed or elected a judge to an original term on or after January 1, 1995, he or she earns two and one-half years of weighted service credit for each year of full-time service as a judge.⁴² However, a judge appointed or elected before January 1, 1995, will earn three and one-half years of weighted service.⁴³

A judge may retire with a reduced benefit as early as age fifty-five if he or she has at least five years of credited service.⁴⁴ If a judge does not meet the age or service requirements for retirement, VRS reduces the benefits.⁴⁵ Judicial Retirement Service

³⁸ See VA. CONST. art. VI, § 9.

³⁹ VA. CODE ANN. § 51.1-300, -302 (West 2007).

⁴⁰ VA. CODE ANN. § 51.1-305, -306 (West 2007).

⁴¹ See Virginia Retirement System-Judicial Retirement System, <http://www.varetire.org/employers/benefitplans/jrs.html> (last visited Oct. 17, 2007) (noting that judges are eligible for unreduced retirement benefits at age 60 if they have thirty years of service and at age 65 if they have at least five years of credited service).

⁴² See VA. CODE ANN. § 51.1-303 (West 2007) (explaining that credited service is the total of weighted and unweighted service).

⁴³ See *id.*

⁴⁴ § 51.1-305.

⁴⁵ See Judicial Retirement System, *supra* note 41 (explaining that benefits will be reduced one-half percent per month for the first sixty months and four-tenths percent for each additional month an individual falls short of meeting the age or service requirements for an unreduced benefit).

members who the General Assembly appointed to an original or subsequent term after July 1, 1993, must retire at age seventy.⁴⁶ The retirement must be within twenty days of the convening of the next regular session of the General Assembly after the member reaches age seventy.⁴⁷ If appointed before January 1995, a judge may reach the maximum benefit after thirteen years of actual service as a judge. If appointed after January 1995, a judge will meet his or her maximum after eighteen years of actual judicial service. For example, a thirty-seven year old woman could be appointed to the bench, obtain reappointment twice, and retire at fifty-five. She could return to practice and still receive her full judicial retirement benefits (likely, upwards of \$130,000 annually) for the rest of her life.

For these reasons, judges will most likely seek reappointment to reach their maximum benefit for retirement. The financial incentive is tremendous, especially given the pay cut most judges take when they abandon private practice for the bench. Because no justice or judge in Virginia has a term that is greater than twelve years, reaping the benefits of the retirement system requires reappointment.⁴⁸ For instance, if the General Assembly appointed a judge to an eight-year term in 1996, the judge would need to seek reappointment twice in order to be eligible for the maximum retirement benefit allotment in 2014.

The General Assembly sets out all judicial compensation, though cities and counties may supplement salaries of any local judges within their geographical boundaries.⁴⁹ As of October 2004, Virginia ranked above the mean among all the states and provinces of the United States for judicial compensation.⁵⁰ Specifically, in 2001, a Supreme Court justice in Virginia received about \$135,000 plus \$6,000 in expenses, compared to the average \$127,169.⁵¹ Furthermore, a judge on the Court of Appeals of Virginia received \$128,730, in contrast to the national average of \$123,629.⁵² The average Virginia trial court judge received \$125,795, compared to \$110,330 nationally.⁵³ Overall, Virginia pays the fifteenth highest

⁴⁶ § 51.1-305.

⁴⁷ *Id.*

⁴⁸ See Virginia-Current Methods of Judicial Selection, *supra* note 31.

⁴⁹ See VA. CONST. art. VI, § 9.

⁵⁰ See *Survey of Judicial Salaries*, 29 National Center for State Courts 2 (2002), available

at http://www.ncsconline.org/WC/Publications/kis_judcomJudSal100104Pub.pdf.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

wage in the union to its Supreme Court justices, the twelfth highest to its Court of Appeals judges, and the tenth highest to its trial court judges.⁵⁴ To understand how the General Assembly values its judges, consider that Virginia ranks in the bottom five in expenditures for kindergarten through high school level education, welfare, and natural resources.⁵⁵

D. Brief History of the Recent Politicization of the Judicial Reappointment Process and Unsuccessful Reform Efforts

For the greater part of the twentieth century, the Democratic Party in Virginia maintained control over the General Assembly.⁵⁶ In the late 1990s, partisan struggles in the General Assembly increasingly shaped the selection of Virginia's judges.⁵⁷ For several decades, the Democratic Party maintained control over the Senate and consequently, also controlled the judicial selection process due to its veto power.⁵⁸ This changed in 1995 when the Senate became evenly split along party lines.⁵⁹ In 1996, the General Assembly failed to fill thirty percent of judicial vacancies due to partisan squabbles,⁶⁰ requiring Governor George Allen to appoint judges to these positions after its session ended.⁶¹ Interim judicial appointments expire at the beginning of the following General Assembly session and are not renewable without appointment by the General Assembly;⁶² thus, they offer no job security for the appointed judge.

⁵⁴ *Id.*

⁵⁵ Bill Sizemore, *Virginia Ranks Near Bottom of the Class*, VIRGINIAN-PILOT, Dec. 22, 2002, at A1.

⁵⁶ Warren Fiske, *Reaching for a Renaissance for Gov. George F. Allen, The Republican Party's Leading Man in Virginia, Nov. 7 Will Be a Defining Moment as the GOP Seeks To Wrest Control of the General Assembly*, VIRGINIAN-PILOT, Oct. 29, 1995, at A-1, available at <http://scholar.lib.vt.edu/VA-news/VA-Pilot/issues/1995/vp951029/10290142.htm>.

⁵⁷ See Ross MacKenzie, Editorial, *On the Growing Partisanization of the General Assembly*, RICHMOND TIMES DISPATCH, Jan. 19, 1997, at F-7 (noting that the General Assembly's partisanship left a number of vacancies to interim appointments).

⁵⁸ See Laura LaFay & Robert Little, *Judging by Gridlock, Allen Will Pick New Justice Partisanship Hinders State's Judicial Selection*, VIRGINIAN-PILOT, Feb. 23, 1997, at A-1, available at <http://scholar.lib.vt.edu/VA-news/VA-Pilot/issues/1997/vp970223/02230181.htm>.

⁵⁹ *Id.*

⁶⁰ See MacKenzie, *supra* note 57.

⁶¹ *Id.* See also William Ruberry, *Odd Coalition Likes System as It Is; Critics Suggest Merit Selection of State Judges*, RICHMOND TIMES DISPATCH, Jan. 16, 1995, at A1 ("When the Virginia General Assembly is out of session, interim judicial appointments for Circuit, Appeals and Supreme courts fall to the governor . . .").

⁶² VA. CONST. art. 6, § 7.

As a result, few qualified candidates are able to accept an interim appointment.

In February 1997, Democrats attempted to reappoint Judge David B. Summerfield to the Juvenile and Domestic Relations Court.⁶³ However, Republican Senator William C. Wampler, Jr. argued that Judge Summerfield's position should go to Greg Baker, a law partner of Republican Delegate Terry G. Kilgore.⁶⁴ Republicans denied that this decision was based on patronage, claiming that they were troubled by Judge Summerfield's "demeanor" and allegations that Summerfield behaved in a "condescending" manner towards attorneys who appeared before him.⁶⁵ The General Assembly not only declined to reappoint Judge Summerfield; it failed to appoint a replacement.⁶⁶

After Virginia Supreme Court Justice Roscoe B. Stephenson Jr. announced his retirement, Democrats and Republicans in the General Assembly fought over whom to appoint to replace him.⁶⁷ Democrats chose Margaret P. Spencer, an African-American General District Court judge from Richmond.⁶⁸ Republicans in the Senate sought former Roanoke Delegate G. Steven Agee.⁶⁹ Refusing to even question Spencer as a viable candidate, Senate Republicans walked out of the Senate Courts of the Justice Committee's planned interview with Spencer.⁷⁰ On the day before the General Assembly was scheduled to adjourn for the year, a fierce debate ensued.⁷¹ The conflict ended in a stalemate.⁷² In May, Governor Allen appointed Cynthia D. Kinser, a Republican federal judge, to fill the vacancy, and in its following term, the General Assembly appointed Judge Kinser.⁷³

⁶³ See Ruth S. Intriss & Michael Hardy, *House, Senate at Impasse on Judicial Appointments*, RICHMOND TIMES DISPATCH, Feb. 6, 1997, at A-10.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ Jeff E. Schapiro, *Lawmakers Battle Over Appointment*, RICHMOND TIMES DISPATCH, Feb. 18, 1997, at A-6.

⁶⁸ Jeff E. Schapiro, *Democrats Back Richmond Judge for Top Court; GOP Senators Favor Roanoke Republican*, RICHMOND TIMES DISPATCH, Feb. 19, 1997, at A-6.

⁶⁹ *Id.* See also Spencer S. Hsu, *Virginia Lawmakers Hagggle Over Supreme Court Nominee; New Member Could Shift Balance of Panel*, WASH. POST, Feb. 21, 1997, at D01.

⁷⁰ Jeff E. Schapiro, *Beyer Supports Black Judge; Republicans Scored for Shunning City's Spencer*, RICHMOND TIMES DISPATCH, Feb. 20, 1997, at A-1.

⁷¹ Jeff E. Schapiro, *Legislators Fail to Elect Justice of Supreme Court*, RICHMOND TIMES DISPATCH, Feb. 22, 1997, at A-7.

⁷² *Id.* See also Spencer S. Hsu, *Va. Lawmakers at Impasse Over Naming Justice; Politics Stymie Appointment; Bills May Be Delayed or Killed*, WASH. POST, Feb. 22, 1997, at C01.

⁷³ Warren Fiske & Laurence Hammack, *Allen Taps Judicially Conservative Woman for Supreme Court Post*, VIRGINIAN-PILOT, May 3, 1997, at B5. See also Ellen Nakashima,

That same year, Senate Democrats' attempted to reappoint Clarke County Circuit Court Judge James L. Berry, who famously refused to grant a gun permit to Oliver North. This attempt also ended in a stalemate, when Republicans sought to replace Judge Berry with attorney John Reed Prosser.⁷⁴ Once again, the stalemate left the Republican Governor with the option to appoint a judge during the interim. Governor Allen eventually appointed Prosser, thereby unseating Berry.⁷⁵

In 1998, the House of Delegates remained evenly split along party lines, while Republicans gained a majority in the Senate.⁷⁶ On January 31, 1998, a "nine-hour standoff" occurred after Thelma Drake, the only Republican among four delegates from Norfolk, fought her Democratic colleagues' attempt to appoint Joseph A. Leafe, former Mayor of Norfolk, to the Norfolk Circuit Court.⁷⁷ When the standoff ended, thirty positions, including the one for which Leafe vied, remained vacant.⁷⁸ Although General Assembly members managed to agree upon the appointment of fifty-six judges,⁷⁹ they decided to put off making decisions about the other positions until the following month.⁸⁰ Republicans and Democrats eventually agreed to appoint Leafe to the position.⁸¹

In March 1998, the General Assembly appointed ten judges, but Republicans and Democrats could not agree upon a candidate for the Virginia Court of Appeals.⁸² In October 1998, Democrats in

Allen Names Moderate Republican Woman to Va. High Court, WASH. POST, May 3, 1997, at B03.

⁷⁴ See Michael Hardy, *Allen Ousts Judge, Names Successor; Assembly Had Deadlocked on Post*, RICHMOND TIMES DISPATCH, May 8, 1997, at B-4.

⁷⁵ *Id.*

⁷⁶ Laura LaFay & Ledyard King, *Party Fight in Legislature Delays Leafe's Judge Quest; Norfolk Del. Drake Stirs Up Wrath in Both Houses*, VIRGINIAN-PILOT, Jan. 31, 1998, at A1.

⁷⁷ *Id.* Drake, claiming the Democrats from the Norfolk delegation left her "out of the judicial loop," refused to back Leafe's appointment "unless she was guaranteed veto power over the selection of Norfolk's new Juvenile and Domestic Relations Court judgeship." *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ Pamela Stallsmith & Tyler Whitley, *GOP Gets Say on Judges; Democrats See Power Play; Some Decisions Wait*, RICHMOND TIMES DISPATCH, Jan. 31, 1998, at A-1.

⁸¹ Jon Frank, *Former Mayor Starts 3rd Career, With Gavel; Leafe Now Serving as Norfolk's Newest Circuit Court Judge*, VIRGINIAN-PILOT, Apr. 28, 1998, at B1. At this time, Republicans and Democrats also agreed upon a candidate for the Juvenile and Domestic Relations judgeship that had been at the center of the struggle between Thelma Drake and her Democratic colleagues on the Norfolk delegation. *Id.*

⁸² Pamela Stallsmith, *10 Judges Elected; 1 Spot Open*, RICHMOND TIMES DISPATCH, Mar. 16, 1998, at A-8.

the General Assembly proposed establishing a non-partisan judicial nomination commission, despite the fact that Democratic General Assembly members had resisted similar suggestions in the past.⁸³ In 1998, Republicans were the ones rejecting the idea.⁸⁴

Neither party is more to blame than the other for politicizing the judicial selection and reappointment process, though the most extensive reporting has occurred in recent years while the Republicans have been in control of both houses of the General Assembly.⁸⁵ After the 1999 election, Republicans maintained a 21-19 majority in the Senate and gained a 52-47 majority in the House.⁸⁶ Republicans in the General Assembly almost immediately pushed for a move towards merit-selection of judges.⁸⁷ In 2000, the House of Delegates and the Senate passed House Joint Resolution No. 212, requesting "the Judicial Council of the Supreme Court of Virginia... recommend evaluation criteria for the judiciary."⁸⁸

In January 2000, Republican General Assembly members established citizens' committees in various localities to "complement the recommendations of local bar associations."⁸⁹ Until the recent changes in procedure by the General Assembly, local bar associations have played an integral role in vetting and offering candidates for the bench.⁹⁰ That same month, Republican General Assembly members announced their plans to establish "a GOP-controlled commission to advise state lawmakers on judicial appointment."⁹¹ For example, Republican General Assembly members from Virginia Beach and Norfolk created committees to screen local judicial candidates.⁹² Although Norfolk has more Democrats than Republicans

⁸³ Tyler Whitley, *GOP Likes Way of Picking Judges, Wants Its Chance*, RICHMOND TIMES DISPATCH, Oct. 3, 1998, at B-5.

⁸⁴ *Id.*

⁸⁵ See Interview with E. Robert Giammittorio, Chief Judge Alexandria General District Court, in Alexandria, Va. (July, 2003) (on file with author). Judge Giammittorio spoke at length about the trouble that Republicans had getting any judge selected by Republicans onto the bench during the many years that the Democrats controlled both houses in the General Assembly. *Id.*

⁸⁶ Stephen Dinan, *Virginia GOP in Driver's Seat After the Long Road to Victory*, WASH. TIMES, Nov. 7, 1999, at C1.

⁸⁷ Editorial, *Judge-Picking: Toward Merit-Selection; GOP Reformers Want a Better Appointment Process-Stressing Qualifications*, VIRGINIAN-PILOT, Jan. 15, 2000, at B6.

⁸⁸ H.R.J. Res. 212.

⁸⁹ *GOP Forms Judges Panel*, *supra* note 17.

⁹⁰ Interview with Melinda Douglas and Jim Lay, Selection Committee Members.

⁹¹ R. H. Melton & Justin Blum, *GOP Leaders Leap at Chance to Reform Court Selections*, WASH. POST, Jan. 12, 2000, at B05.

⁹² Jennifer Peter, *Virginia: GOP Wants Open Process of Evaluating Judicial Candidates*, VIRGINIAN-PILOT, Jan. 12, 2000, at A1.

in the General Assembly, Republicans choose the members of the Norfolk committee.⁹³

By late January 2000, Republicans had established the Joint Judicial Advisory Committee and appointed all fourteen members of the "bipartisan panel."⁹⁴ Democratic General Assembly members considered a resolution backing the creation of the Committee.⁹⁵ Some who opposed the resolution argued that going on record in support of the Republicans' plan would create the impression that Democrats had "thrown in the towel and given up on its chances of winning back control."⁹⁶ Others asserted that the Committee gave Republicans more power because they would be in charge of selecting its members.⁹⁷ Those who favored the resolution contended that the Democratic party owed its recent losses, in part, to its members' resistance to merit-based selection of judges.⁹⁸ Ultimately, the Democratic legislators voted down the resolution.⁹⁹

In March of 2000, Democrats cried foul when Suffolk Delegate Chris Jones chose Norfolk-based attorney D. Arthur Kelsey for a position as a Circuit Court judge in Suffolk, despite his lack of familiarity with Suffolk's legal landscape.¹⁰⁰ That same month the General Assembly also elevated appellate judge Donald W. Lemons to the Virginia Supreme Court with little controversy.¹⁰¹

As the 2000 General Assembly Session drew to a close, the *Richmond Times-Dispatch* claimed that "the new system worked," because the bipartisan Joint Judicial Advisory Committee had reviewed most of the candidates for various judgeships that year and "the Assembly agreed on the appointments with a minimum of partisan bickering."¹⁰² However, others pointed out that the majority of the

⁹³ Matthew Dolan, *State Looks at Ways to Judge the Judges A Growing Movement, Led by Republicans, Aims to Make Those on the Bench More Accountable for Their Performances*, VIRGINIAN-PILOT, Jan. 29, 2001, at A1.

⁹⁴ *Metro in Brief: Virginia: GOP's Picks for Judicial Advisory Panel*, WASH. POST, Jan. 28, 2000, at B3; Judicial Selection in Virginia, *supra* note 20.

⁹⁵ Tyler Whitley, *Proposal on Judges Rejected; Democrats Dislike Merit Selection Plan*, RICHMOND TIMES DISPATCH, Feb. 13, 2000, at C-1.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ Meredith Kruse, *Judicial Pick is "Radical Departure" Del. Chris Jones Picks "Outsider" for Circuit Court*, VIRGINIAN-PILOT, Mar. 4, 2000, at B1.

¹⁰¹ Jeff E. Schapiro, *Lemons Voted to Virginia High Court; 22 Others Appointed to State Judgeships*, RICHMOND TIMES DISPATCH, Mar. 9, 2000, at A-6.

¹⁰² Editorial, *Judicial Selection*, RICHMOND TIMES DISPATCH, Mar. 17, 2000, at A-14.

members of the Committee were Republicans, as were many of the new judges.¹⁰³

In September 2003, David Baugh, a criminal defense lawyer from Richmond, filed suit in a Richmond Circuit Court seeking an injunction prohibiting members of the General Assembly from questioning candidates for judgeships about previous decisions or decisions they might make in future cases.¹⁰⁴ According to Baugh, the General Assembly's interrogation sessions violated the Virginia Constitution that mandates the three branches of government remain "separate and distinct."¹⁰⁵

III. THE CANONS AND THE JUDICIAL INQUIRY AND REVIEW COMMISSION: THE TRANSPARENT METHODS FOR REVIEW

A. *Canons of Judicial Ethics*

Several of the Canons of Judicial Conduct for the Commonwealth of Virginia are applicable to judicial reappointment.¹⁰⁶ The following describes the Canons and the Sections (each of which is authoritative) and the Commentary (which is advisory)¹⁰⁷ that should direct the decision-making and conduct of Virginia judges. Canons are available in each state as a guide for judges' comportment both on and off the bench, and many state legislatures turn to the ABA Model Code for Judicial Conduct as a guide.¹⁰⁸

The General Assembly charged the judges of the Commonwealth with the task of interpreting and applying the laws by strict adherence to the Canons.¹⁰⁹ A fundamental doctrine of the Canons is that judges adjudicate matters with disregard for political views and motivations.¹¹⁰ For instance, Canon Three, "A Judge Shall Perform the Duties of Judicial Office Impartially and Diligently," mandates a duty of political indifference, stating that a "judge shall not be swayed by partisan interests, public clamor or fear of criticism."¹¹¹ The General Assembly further determined in Canon

¹⁰³ Michael Hardy & Jeff E. Schapiro, *Rating the New Leadership; Legislators See Assembly Session in Different Lights*, RICHMOND TIMES DISPATCH, Mar. 12, 2000, at A-1.

¹⁰⁴ Alan Cooper, *Baugh Sues Over Questions Posed to Judges*, RICHMOND TIMES DISPATCH, Sept. 25, 2003, at B-3.

¹⁰⁵ *Id.* (citing VA. CONST. art. III, § 1).

¹⁰⁶ See Canons of Judicial Conduct, *supra* note 4.

¹⁰⁷ *Id.*

¹⁰⁸ See generally Model Code of Judicial Conduct 2004 Edition, *supra* note 4.

¹⁰⁹ See Canons of Judicial Conduct, *supra* note 4.

¹¹⁰ See *id.* (noting that Canon 1 indicates that the standards of Virginia's judicial system are based on the concept of a fair and independent judiciary).

¹¹¹ See *id.*

Three that a judge shall be “faithful to the law and maintain professional competence in it.”¹¹² The Canons stipulate that a judge must perform duties without bias or prejudice: A judge shall not, “by words or conduct manifest bias or prejudice . . . based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status.”¹¹³

The commentary to Canon One, “A Judge Shall Uphold the Integrity and Independence of the Judiciary,”¹¹⁴ notes that the “integrity and independence of judges depends in turn upon their acting without fear or favor. Although judges should be independent, they must comply with the law, including the provisions of these Canons.”¹¹⁵ Canon Two emphasizes the importance of judicial appearances, stating that a judge “shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.”¹¹⁶ The General Assembly has made it clear that politics should not affect judges.¹¹⁷ Furthermore, the General Assembly’s evaluation process will comprise of a review of the judge’s commitment and strict adherence to these rules of impartiality, the application of the law, and freedom from partisan tensions.¹¹⁸

Political impartiality should not only pervade judicial decision-making and serve as the primary basis for review during reappointment, but theoretically, it should also serve as fundamental criteria in judicial selection. When determining whether to appoint a judge or justice, the General Assembly seeks input from

¹¹² See *id.*

¹¹³ See *id.* (explaining that Canon 3B(5) outlines that this does not preclude proper judicial consideration when such demographic factors are issues in the proceeding).

¹¹⁴ See *id.*

¹¹⁵ See Canons of Judicial Conduct, *supra* note 4.

¹¹⁶ See *id.* (explaining that Canon 2(A) requires that judges must avoid conflicts of interest and make decisions based on a neutral application of the law without influence from external factors). In addition, commentary to Canon 2(b) states that “[m]aintaining the prestige of judicial office is essential to a system of government in which the judiciary functions independently of the executive and legislative branches.” *Id.*

¹¹⁷ See *id.*

¹¹⁸ See *id.* (explaining, in the preamble, that any transgression in the canons may lead to the discipline of the judge). The Judicial Inquiry and Review Commission, composed of judges, lawyers, and non-lawyer citizens elected by the General Assembly, investigates complaints and takes appropriate disciplinary steps if necessary. See Virginia’s Judicial System—About the Judicial Inquiry & Review Commission, <http://www.courts.state.va.us/pamphlets/inquiry.htm> (last visited Oct. 17, 2007).

several different groups, including local bar associations¹¹⁹ and the Virginia State Bar.¹²⁰ These organizations evaluate judges using general guidelines that include several characteristics, including but not limited to, “integrity, judicial temperament, impartiality, legal skills, health, management skills and public service.”¹²¹ In many ways, the characteristics mirror the actual attitudes that the Canons demand that judges embody. Political motivations, personal religious or moral beliefs, and attitudes or opinions about social issues are not among the criteria.¹²² The criteria focus on examining the entire body of a judge’s work, not isolated or specific opinions. The Virginia State Bar explicitly advises against focusing on the personal beliefs of judges, stating that “there should be no issue-oriented litmus test for selection of a candidate.”¹²³

B. Judicial Inquiry and Review Commission Review Procedures

Virginia’s Bill of Rights states that “[t]he legislative, executive, and judicial departments of the Commonwealth should be separate and distinct.”¹²⁴ Article III explains that separation of powers is necessary “so that none exercise the powers properly belonging to the others.”¹²⁵ In Article VI, § 10, entitled “Disabled and Unfit Judges,” the Virginia Constitution empowers the General Assembly to create the Judicial Inquiry and Review Commission.¹²⁶ The Commission may investigate charges asserted against judges and “[i]f the Commission finds the charges to be well-founded, it may file a formal complaint before the Supreme Court.”¹²⁷ The Virginia Supreme Court shall then conduct a hearing to determine whether a judge shall be retired, removed, or censured.¹²⁸ The Commission sometimes “settles” complaints through arbitration or other means which do not require a hearing.¹²⁹

¹¹⁹ Interview with Melinda Douglas and Jim Lay, Selection Comm. Members.

¹²⁰ See Jessie Halladay, *What Makes a Fit Judge? Criteria Are Debated; Nothing Specific Set in Virginia Law*, DAILY PRESS, Jan. 17, 2003, at A7, available at <http://www.dailypress.com/news/dp-33782sy0jan17,0,4296151.story>.

¹²¹ *Id.*

¹²² See *id.*

¹²³ *Id.*

¹²⁴ VA. CONST. art. I, § 5.

¹²⁵ VA. CONST. art. III, § 1.

¹²⁶ VA. CONST. art. VI, § 10.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ This author was subpoenaed as a witness on behalf of a judge facing a Judicial Inquiry and Review Commission complaint, but because the judge and the complaining party arbitrated a result that did not result in the need for a hearing to determine whether the judge would be removed, this author did not testify.

If the Supreme Court after the hearing on the complaint finds that the judge has engaged in misconduct while in office, or that he has persistently failed to perform the duties of his office, or that he has engaged in conduct prejudicial to the proper administration of justice, it shall censure him or shall remove him from office.¹³⁰

The Canons also control the conduct of Virginia's judges.

Our legal system is based on the principle that an independent, fair and competent judiciary will interpret and apply the laws that govern us. . . . The text of the Canons and Sections is intended to govern conduct of judges and to be binding upon them. It is not intended, however, that every transgression will result in disciplinary action. Whether disciplinary action is appropriate, and the degree of discipline to be imposed, should be determined through a reasonable and reasoned application of the text and should depend on such factors as the seriousness of the transgression, whether there is a pattern of improper activity and the effect of the improper activity on others or on the judicial system.¹³¹

IV. CASE STUDIES

There is a tension in the text of Virginia's Constitution and the Rules of the Court between the preservation of an independent judiciary and oversight by the legislature. As we examine the cases where the increasing politicization bore fruit of an ideological litmus test, we should ask whether the General Assembly even used the rules of the Canons in its assessment. We should ask ourselves whether the legislature acted in accordance with the principles and spirit of Virginia's governing documents. We should ask include whether a judge, "engaged in misconduct while in office;" "persistently failed to perform the duties of his office;" "engaged in conduct prejudicial to the proper administration of justice;"¹³² and whether the legislature, when employing "reasonable and reasoned application of the text," found a serious "transgression" or "pattern of improper activity" that had a significant effect "on others or on the judicial system."¹³³

Before moving into the three case studies, two examples help set the stage. In February 2001, Republicans blocked Democrats'

¹³⁰ VA. CONST. art. VI, § 10.

¹³¹ See Canons of Judicial Conduct, *supra* note 4.

¹³² VA. CONST. art. VI, § 10.

¹³³ See Canons of Judicial Conduct, *supra* note 4 (describing, in the preamble, the manner in which the Judicial Inquiry and Review Commission should interpret and apply the Canons).

attempt to reappoint Judge Katherine Howe Jones, an African-American woman, to her position on a Norfolk General District Court.¹³⁴ Although the Judicial Inquiry and Review Commission had never sanctioned Judge Jones, GOP leaders cited allegations that she “regularly yelled at victims and defendants, cut off witness testimony and laced her rulings with unnecessary sarcasm.”¹³⁵ Republicans further claimed that Judge Jones had “very serious issues” and displayed “bizarre behavior.”¹³⁶ However, the General Assembly’s Courts of Justice Committee refused to grant Judge Jones a hearing in which she could address the allegations.¹³⁷ Norfolk Delegate William P. Robinson, a Democrat, along with the local NAACP, felt that the Republicans’ move was “racially motivated.”¹³⁸

Democrats responded to the Republicans’ attack on Judge Jones by grilling former prosecutor Norman A. Thomas, the Republican choice for Judge Jones’s position.¹³⁹ Democrats noted that the state bar was currently investigating Thomas and that the local bar association previously rated him as “unqualified” to be a judge.¹⁴⁰ Nonetheless, the Republican-controlled General Assembly, by majority vote, appointed Thomas to Judge Jones’s position.¹⁴¹

The example involving former Judge Verbena M. Askew is perhaps most indicative of the fierceness of the conservative agenda. Conservatives in the house delayed reappointing Askew, a Circuit Court judge from Newport News, and eventually voted to remove her from the bench.¹⁴² During Askew’s 2003 reappointment proceedings, the House Courts of Justice Committee, led by Republican Delegate Robert McDonnell, questioned Askew for seven hours about her sexual orientation and about alleged sexual

¹³⁴ Matthew Dolan & Christina Nuckols, *GOP Blocks Judge’s 2nd Appointment to Bench Republican: Jurist’s Behavior Led to Move*, VIRGINIAN-PILOT, Feb. 10, 2001, at B1. The general district courts in Virginia are courts not of record, so there is little concrete evidence from which the Committee could assess Judge Jones’s behavior. See VA. CODE ANN. § 16.1-69.5 (West 2007).

¹³⁵ Dolan & Nuckols, *supra* note 134.

¹³⁶ *Id.*

¹³⁷ Christina Nuckols, *Judge Won’t Get Hearing, Say Two Key Lawmakers Stolle Joins Critics, Saying Courtroom Press Conference Was Sign of Indiscretion*, VIRGINIAN-PILOT, Feb. 16, 2001, at B4.

¹³⁸ Dolan & Nuckols, *supra* note 134.

¹³⁹ Matthew Dolan, *Democrats Turn Up Heat on Candidate for Judgeship*, VIRGINIAN-PILOT, Feb. 21, 2001, at B1.

¹⁴⁰ *Id.*

¹⁴¹ Matthew Dolan, *Democrats Unable to Salvage Norfolk Judgeship for Jones*, VIRGINIAN-PILOT, Feb. 22, 2001, at B4.

¹⁴² Tyler Whitley & Alan Cooper, *Judge Will Not Be Re-Elected; Askew Will Vacate Newport News Spot*, RICHMOND TIMES DISPATCH, Jan. 23, 2003, at A1.

encounters, rather than about her performance as a judge.¹⁴³ The interrogation focused on a sexual harassment claim lodged by a female worker that was settled out of court by the City of Hampton.¹⁴⁴ Askew repeatedly denied wrongdoing.¹⁴⁵

Delegate Kenneth Melvin (D-Portsmouth) stated that “hearsay was rampant” at Askew’s hearing and that the Committee’s focus on sexual orientation was “nothing more than a philosophical litmus test.”¹⁴⁶ Delegate Flora Crittenden (D-Newport News) reiterated complaints about the Committee’s conduct, stating that Askew “was treated like a common criminal.”¹⁴⁷ The Republican-controlled General Assembly denied Askew’s reappointment, basing their decision on claims that Askew lied about her advances and then attempted to cover them up.¹⁴⁸

Askew’s case is very unusual because the General Assembly had a debatable issue in the sexual harassment claim leveled against Askew. The rhetoric of the legislators involved in the hearing made clear that the real issue was Askew’s perceived sexual orientation.¹⁴⁹ In one of the more telling questions from the session, dele-

¹⁴³ See Larry O’Dell, *Assembly Elects Former Delegate to Supreme Court*, DAILY PRESS, Jan. 21, 2003, <http://www.dailypress.com/news/dp-va-xgr-judges0121jan21,0,1340489.story>; Halladay, *supra* note 125; Jeff E. Schapiro & Pamela Stallsmith, *Tension Pervades Assembly; Relations Unravel Over Askew Matter*, RICHMOND TIMES DISPATCH, Jan. 24, 2003, at A-1.

¹⁴⁴ R. H. Melton, *GOP Grilling of Judge in Va. Has Aura of a Trial*, WASH. POST, Jan. 18, 2003, at B01.

¹⁴⁵ See Alan Cooper, *Judge Denies Woman’s Charge; Assembly Panels Hear Testimony in Joint Session*, RICHMOND TIMES DISPATCH, Jan. 18, 2003, at B-1.

¹⁴⁶ O’Dell, *supra* note 143.

¹⁴⁷ See *id.*

¹⁴⁸ Sodomy Laws, Virginia Denies Askew Seat, <http://www.sodomylaws.org/usa/virginia/vanews102.htm> (last visited on Oct. 17, 2007).

¹⁴⁹ The Republican Assembly denied Judge Askew’s reappointment based more on her sexual orientation and an allegation of sexual harassment than on her judicial performance. See Whitley & Cooper, *supra* note 142.

The Canons govern judicial conduct outside the courtroom as well. The Commentary to Canon 3B(5) states that “a judge must refrain from speech, gestures or other conduct that could reasonably be perceived as sexual harassment.” See Canons of Judicial Conduct, *supra* note 4. Canon 3C(1) states that “a judge shall diligently discharge the judge’s responsibilities without bias or prejudice and maintain professional competence in judicial administration.” See *id.*

However, Judge Askew did not dishonor these rules. Nowhere in the Canons does the sexual orientation of a jurist affect his or her conduct, competence, fitness to serve, or the public’s confidence in his or her judicial independence. See *generally id.* Indeed, the Canons preclude a judge from undertaking the precise prejudicial and biased behavior exhibited towards Judge Askew in her reappointment proceedings.

gate Robert McDonnell reportedly asked a witness how close Askew was sitting to a female friend at a recent dinner.¹⁵⁰

For many candidates evaluated for reappointment in the past several years, political issues and the social agenda of the General Assembly marred the reappointment process. These judges, applying the law and reasoning in a wholly unexceptionable manner, decided cases and issued opinions, which members of the Republican-controlled General Assembly perceived as failing the conservative litmus test. Two of these cases concerned the rights of a gay parent, and one concerned gun control.

A. *Justice Barbara Keenan*

In January 2003, Virginia Supreme Court Justice Barbara M. Keenan sought reappointment.¹⁵¹ Republicans in the General Assembly grilled Justice Keenan, as usual in an unreported session,¹⁵² about her dissenting opinion in *Bottoms v. Bottoms*.¹⁵³ The case concerned a maternal grandmother's petition, filed against her daughter, for custody of her grandson.¹⁵⁴ The Virginia Supreme Court reversed an appellate court decision and granted custody of the child to the child's grandmother, stating that one of the factors considered was the mother's lesbian relationship at the time of the custody hearing.¹⁵⁵ In reaching its decision, the majority determined that the sexual orientation of the mother would impose a burden on the child and that the child would suffer social condemnation stemming from exposure to homosexual living arrangements.¹⁵⁶

Chairman of the House Courts of Justice Committee, Del. Robert McDonnell (R-Virginia Beach), indicated that lawmakers have a duty to review judges' work product and actions when up for re-election. O'Dell, *supra* note 148. Also, according to McDonnell, individuals may not be fit to serve as judges if they violate the state's now debunked "crimes against nature" laws that prohibited all oral and anal sex. See Halladay, *supra* note 125. This statement instigated counter-arguments from judicial selection experts, who remarked that the sexual orientation characteristics of judges were not part of any codified judicial selection criteria. *Id.* McDonnell's vision stands in contradiction to any vision that treats homosexuals equally, either through a role on the bench or under the law.

¹⁵⁰ Panel Ousts Judge They Tried to Oust, THE GAY PEOPLE'S CHRONICLE, <http://www.gaypeopleschronicle.com/stories03/03jan31.htm>.

¹⁵¹ See Christina Nuckols, *Concerns Arise Over Judge Selection; At the Center of the General Assembly Issue Are Questions Over Sexual Orientation*, VIRGINIAN-PILOT, Jan. 17, 2003, at B1.

¹⁵² See *id.*

¹⁵³ *Bottoms v. Bottoms*, 457 S.E.2d 102, 109 (Va. 1995) (Kennan, J., dissenting).

¹⁵⁴ *Id.* at 104.

¹⁵⁵ *Id.* at 108-09.

¹⁵⁶ *Id.* at 108.

Keenan dissented and maintained that the trial court improperly found the mother *per se* unfit because of her sexual orientation.¹⁵⁷ In her dissent, Keenan referenced the controlling law in the Commonwealth and the majority of states that “[a] lesbian mother is not *per se* an unfit parent.”¹⁵⁸ Keenan asserted that the court of appeals was correct when it found that “adverse effects of a parent’s homosexuality on a child cannot be assumed without specific proof.”¹⁵⁹ Keenan continued that “[a]lthough there is no evidence in this record showing that the mother’s homosexual conduct is harmful to the child, the majority improperly presumes that its own perception of societal opinion and the mother’s homosexual conduct are germane to the issue [of] whether the mother is an unfit parent.”¹⁶⁰ Keenan rejected the Virginia Supreme Court’s decision as wholly based on societal perception and norms, rather than the issue of law at hand.¹⁶¹ Keenan’s dissent attempts to be faithful to the law rather than a personal perception of societal opinion. She rigorously abided by the Canons, acting within their letter and spirit, especially with regard to the requirement for impartiality.¹⁶²

Canon One requires a judge to “uphold the integrity and independence of the judiciary” which under Section A, “is indispensable to justice in our society.”¹⁶³ The Commentary to Canon One provides that a judge must act “without fear or favor” and “must comply with the law.”¹⁶⁴ Justice Keenan met the mandate of Canon One by rejecting the trial court’s failure to follow the law. She refused to favor a societal predisposition or succumb to a fear that her view would be unpopular or politically unacceptable.

Canon Two requires a judge to avoid impropriety or the appearance of impropriety.¹⁶⁵ While the Canon generally deals with a judge’s professional and personal behavior, it can also indirectly extend to decision-making. Thus, Section A states that a judge “shall respect and comply with the law” and “promotes public con-

¹⁵⁷ *Id.* at 109 (citing *Doe v. Doe*, 284 S.E.2d 799, 806 (Va. 1981)).

¹⁵⁸ *Id.* See also *Doe v. Doe*, 284 S.E.2d 799, 806 (Va. 1981).

¹⁵⁹ *Bottoms v. Bottoms*, 444 S.E.2d 276, 283 (Va. Ct. App. 1994), *rev’d*, 457 S.E.2d 102 (Va. 1995). See also *Doe*, 284 S.E.2d at 805.

¹⁶⁰ *Bottoms*, 457 S.E.2d at 109.

¹⁶¹ *Id.*

¹⁶² See Canons of Judicial Conduct, *supra* note 4 (purporting, in the commentary, that a judge who manifests any bias in the proceedings brings the judiciary into disrepute).

¹⁶³ See *id.*

¹⁶⁴ See *id.*

¹⁶⁵ See *id.*

fidence in the integrity and impartiality of the judiciary.”¹⁶⁶ Section B provides that “[a] judge shall not allow family, social, political or other relationships to influence the judge’s judicial conduct or judgment.”¹⁶⁷ Justice Keenan followed these precepts by freeing her opinion of any family, social or political prejudice, or influence. Accordingly, she sought to promote the judicial integrity and impartiality mandated by Canon Two.

Canon Three requires a judge to “perform the duties of judicial office impartially and diligently.”¹⁶⁸ Under Section B(2), “a judge shall be faithful to the law” and “not be swayed by partisan interests, public clamor or fear of criticism.”¹⁶⁹ By refusing to grant child custody to a grandmother over a lesbian mother, Justice Keenan sought to follow the law, without regard for the potential of public clamor or judicial criticism. Under Section B(5), a judge is required to “perform judicial duties without bias or prejudice” and cannot “in the performance of judicial duties . . . manifest bias or prejudice.”¹⁷⁰ Justice Keenan rejected the trial court’s decision as one rooted in prejudice, societal perception and expectation, not the rule of law. She ably discharged her duty under Canon Three.¹⁷¹

Republican legislators made their views on homosexuality and their conservative agenda clear through their questioning.¹⁷² Equality Virginia¹⁷³ chairman Joseph R. Price accused Republican delegates of “a targeted effort to get rid of judges they think are sympathetic to gay issues.”¹⁷⁴ Democratic delegate Kenneth R. Melvin expressed concerns over Republican legislators’ “inordinate curiosity about legal opinions that touch upon sexual orientation.”¹⁷⁵ Republican delegate Bradley P. Marrs countered Melvin’s comment, stating that “[h]omosexuality is a form of sexual misconduct that is

¹⁶⁶ *See id.*

¹⁶⁷ *See id.*

¹⁶⁸ *See* Canons of Judicial Conduct, *supra* note 4.

¹⁶⁹ *See id.*

¹⁷⁰ *See id.*

¹⁷¹ *See also id.* (explaining, in the commentary, that “[a] judge who manifests bias on any basis in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute”).

¹⁷² *See* Nuckols, *supra* note 151.

¹⁷³ “Equality Virginia is a state-wide, non-partisan lobbying, education and support network for the gay, lesbian, bisexual, transgender, and straight allied (GLBT) communities in Virginia.” *See* About Equality Virginia, <http://www.equalityvirginia.org/site/pp.asp?c=dfIIITMIG&b=132619> (last visited Oct. 17, 2007).

¹⁷⁴ Nuckols, *supra* note 151.

¹⁷⁵ *Id.*

a crime . . . I don't believe in the genetic explanation of homosexuality, so to say someone is a homosexual means that person is engaged in illegal behavior on a regular basis."¹⁷⁶ Of course, Judge Keenan's dissent tracked to jurisprudence of the majority opinion in *Lawrence v. Texas*.¹⁷⁷ A full eight years before the U.S. Supreme Court reached its decision, Keenan found her way to a similar analysis.

The General Assembly ultimately reappointed Keenan, but only after thoroughly scrutinizing her dissent in *Bottoms*.¹⁷⁸ This scrutiny served to chill the independence of other judges, especially those who needed reappointment to achieve full retirement benefits.

B. Judge Rosemarie Annunziata

With Justice Keenan, the General Assembly frankly articulated the conservative ideological litmus test which it intended to use in the judicial reappointment process. Also in 2003, but after the Keenan hearing, the General Assembly reinforced the litmus test in its questioning of court of appeals Judge Rosemarie Annunziata.¹⁷⁹ The House Courts of Justice Committee postponed reappointing Judge Rosemarie Annunziata to the Virginia Court of Appeals,¹⁸⁰ asking her to return for an additional round of questioning before sending her nomination to the full legislature.¹⁸¹ This outright preparation for interrogation of a judicial candidate was an aberration from the past norm of judicial reappointment.¹⁸²

Republicans on the Committee were specifically concerned with Annunziata's opinion in *Piatt v. Piatt*.¹⁸³ In *Piatt*, the Virginia Court of Appeals upheld a lower court decision granting primary physical custody of a divorced couple's child to the husband.¹⁸⁴ After the couple separated, both the husband and wife had extra-marital sexual relationships with women.¹⁸⁵ Both husband and wife,

¹⁷⁶ *Id.*

¹⁷⁷ 539 U.S. 558 (2003).

¹⁷⁸ See Nuckols, *supra* note 151.

¹⁷⁹ See O'Dell, *supra* note 143.

¹⁸⁰ Nuckols, *supra* note 151.

¹⁸¹ *Id.* See also Steven Ginsberg & Michael D. Shear, *In Va., Fears of a Judicial Litmus Test; Delay in Reappointment Highlights Tensions Over House Review Process*, WASH. POST, Jan. 16, 2003, at B01.

¹⁸² See *id.*

¹⁸³ 499 S.E.2d 567 (Va. Ct. App. 1998).

¹⁸⁴ *Id.* at 572.

¹⁸⁵ *Id.* at 569.

arguably, violated the Virginia statutes: he, the fornication¹⁸⁶ and adultery¹⁸⁷ statutes and she, the consensual sodomy statute.¹⁸⁸ On appeal, the wife claimed that the lower court improperly based its decision on the parties' sexual orientation.¹⁸⁹ The appellate court disagreed.¹⁹⁰

In her dissent, Judge Annunziata found for the wife, maintaining that the trial court "applied different standards when evaluating the parties' post-separation sexual conduct."¹⁹¹ Annunziata reasoned that the Court should have remanded the case and applied a more symmetrical analysis of the law.¹⁹² Since both parents engaged in similar, arguably illegal, behavior, Judge Annunziata disagreed with the majority opinion that described the mother's conduct as promiscuous, while asserting that the father's conduct created a secure environment for the child.¹⁹³ Annunziata reasoned that the trial judge, who granted custody to the father, applied "different standards when evaluating the parties' post-separation sexual conduct."¹⁹⁴ Like Keenan, Annunziata chose to apply the law equally to both parties, in accordance with an unexceptionable interpretation of the prevailing common law and statutes. Moreover, she followed the letter and spirit of the Canons in her dissent, particularly with regard to the standards for impartiality.¹⁹⁵

During Judge Annunziata's lengthy reappointment hearing, again without a record, Del. Bradley P. Marrs, a Republican from Richmond, questioned Annunziata about her dissenting opinion.¹⁹⁶ Marrs held that "[t]he case was about whether homosexual conduct and heterosexual conduct were on the same plane."¹⁹⁷ Continuing, Marrs stated that Annunziata "indicated that they were. I believe they were not. There were a host of factors relied upon for that decision. She chose to emphasize that one issue."¹⁹⁸ Marrs' ideology, however, runs directly counter to the law of the Common-

¹⁸⁶ VA. CODE ANN. § 18.2-344 (West 2007). This statute has since been held unconstitutional by the Supreme Court of Virginia. See *Martin v. Zihler*, 607 S.E.2d 367 (Va. 2005).

¹⁸⁷ VA. CODE ANN. § 18.2-365 (West 2007).

¹⁸⁸ VA. CODE ANN. § 18.2-361 (West 2007).

¹⁸⁹ *Piatt*, 499 S.E.2d at 572.

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 574 (Annunziata, J., dissenting).

¹⁹² *Id.*

¹⁹³ *Id.* at 573.

¹⁹⁴ *Id.* at 574.

¹⁹⁵ See generally Canons of Judicial Conduct, *supra* note 4.

¹⁹⁶ See Ginsberg & Shear, *supra* note 181.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

wealth at the time of the *Piatt* decision. Under the law, courts were required to apply the same standard to decide what effect a non-marital relationship will have on a child regardless of sexuality.¹⁹⁹ What is problematic is that Annunziata chose to follow the law correctly and faced the retaliation of the litmus test. The treatment of Annunziata prompted some Democrats to express concerns that reappointing judges based on their ideologies undermined judicial independence.²⁰⁰ Some Republicans agreed.²⁰¹ Because the reappointment hearing for Annunziata was unusually long and exceptionally political, the potential for chilling other judges from acting in accordance with the Canons, but in conflict with majority political opinion, looms large.

In her dissent, Judge Annunziata maintained that different standards of acceptable behavior should not be employed in evaluating the "post-separation sexual behavior" of divorcing spouses.²⁰² Both the husband and wife had extramarital sexual relations with women, yet the majority of the court of appeals found the wife's conduct impermissibly promiscuous while the father's similar conduct did not jeopardize the child's well being.²⁰³ Judge Annunziata pointed to the legal requirement for symmetry.²⁰⁴ She maintained that different standards should not be imposed in determining parental fitness based on societal prejudice, ideology or sexual preference.²⁰⁵ Judge Annunziata followed the provisions of Canons One, Two, and Three and the Sections relating to a judge's faithful adherence to the rule of law, impartiality, independence and freedom from bias, prejudice and partisanship. These provisions, as described above, relate equally to the conduct and decision-making of Judge Annunziata. A judicial ruling based on ideology, rather than the impartial application of the governing legal standard, undermines judicial independence and the public's confidence in the judiciary.²⁰⁶

¹⁹⁹ See *Piatt*, 499 S.E.2d at 570 (asserting that the effect of a non-marital relationship on a child is not based on the parents' involvement in a homosexual or heterosexual relationship but "whether it has had any adverse impact on the child.").

²⁰⁰ Ginsberg & Shear, *supra* note 181.

²⁰¹ *Id.*

²⁰² *Piatt*, 499 S.E.2d at 574.

²⁰³ *Id.* at 570-74 (Annunziata, J., dissenting).

²⁰⁴ *Id.* at 572-74 (Annunziata, J., dissenting).

²⁰⁵ *Id.*

²⁰⁶ See also Canons of Judicial Conduct, *supra* note 4.

C. Judge Alfred Swersky

The General Assembly's recent openly biased and conservative agenda is clear not only in legal matters pertaining to homosexuals but also in other politically charged issues, specifically gun control. In January 2002, Alexandria Circuit Court Judge Alfred D. Swersky appeared before the House Courts of Justice Committee seeking reappointment.²⁰⁷ For over an hour, House Speaker S. Vance Wilkins, Jr., who later claimed to dislike "activist judges who want to make the law on their own," questioned Swersky about his unpublished, trial-level decision from a case in Alexandria, Virginia.²⁰⁸ In the case, Judge Swersky upheld an Alexandria ordinance barring firearms from municipal worksites.²⁰⁹ Although Swersky's holding in the case was upheld by the Virginia Supreme Court, the Republican-controlled General Assembly scrutinized and questioned Swersky about it.²¹⁰ Republican Speaker Wilkins, who sponsored a 1989 state statute prohibiting localities from regulating ownership or possession of firearms, led the charge.²¹¹ Wilkins' intense questioning concerned many members of the General Assembly, especially Democrats in the House who believed that rulings on gun cases would become "litmus tests for reappointment to judicial posts."²¹² The General Assembly eventually reappointed Swersky.²¹³

In the case mentioned above, Judge Swersky upheld an ordinance prohibiting firearms at public work sites.²¹⁴ He did so in accordance with a specific regulation, rather than any ideological or political motive, basing his decision on his interpretation of regulations aimed at preventing violent, disruptive behavior in city workplaces.²¹⁵ Judge Swersky acted without "fear or favor"²¹⁶ and

²⁰⁷ R. H. Melton, *House Speaker Presses Judge on Case*, WASH. POST, Jan. 25, 2002, at B08.

²⁰⁸ *Id.*

²⁰⁹ *Id.* In his opinion, Swersky determined that the city manager had authority to control and regulate the use and management of handguns on city property. *Id.* The manager, Lawson, ordered the ban on firearms shortly after a shooting in front of a city recreation center. *Id.* Swersky applied the law without ideological motive and interpreted existing regulations prohibiting "violent, disruptive or inappropriate behavior by members of the public in City workplaces" to uphold the city ordinance. Melton, *supra* note 207.

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.*

²¹³ See Lisa Rein, *Va. House Votes to Overturn Gun Ban*, WASH. POST, Feb. 28, 2002, at B01; Michael D. Shear & Patricia Davis, *Va. GOP Reclaims Naming of Judges; Legislators Move to Preempt Warner*, WASH. POST, July 27, 2003, at C01.

²¹⁴ See *Sentiger v. Lawson*, CH 981074 (Alexandria Cir. Ct. Jan. 13, 1999).

²¹⁵ *Id.*

made his decision without regard for “partisan interests, public clamor or fear of criticism.”²¹⁷ Since gun control is a politically charged issue, Judge Swersky’s decision more than likely politically unpopular, and thus, it had the potential to have adverse consequences on his reappointment. Nonetheless, Judge Swersky, following the Canons, refused to bow to political or societal pressure or fear and faithfully interpreted the law. He upheld the letter and spirit of the Canon, and he continued to maintain his interpretation of the law throughout his contentious reappointment hearing.²¹⁸

Befitting the troubles Swersky faced in re-appointment, the process of selecting his replacement to the circuit court was another overtly politicized process, with the General Assembly showing little regard for the qualifications and temperament of the candidates.²¹⁹ In the spring of 2003, Judge Alfred D. Swersky announced his plans to retire from the bench.²²⁰ Following tradition, the selection committee accepted applications from candidates, conducted interviews, and gave reviews to the Bar members who then voted.²²¹ Nolan B. Dawkins, a ten-year veteran judge in the juvenile court and a lifetime resident of the city of, received a rating of “exceptionally qualified” from the selection committee and “won” the Bar vote.²²² In May, after the legislative session ended, five Democratic members of the General Assembly recommended that Governor Warner appoint Judge Dawkins to replace Judge Swersky.²²³ In July, Republicans announced that if Warner ap-

²¹⁶ VA. SUP. CT. R. PT. 6, § III, Canon 1 Cmt. (1999).

²¹⁷ VA. SUP. CT. R. PT. 6, § III, Canon 3(B)(2) (1999).

²¹⁸ See generally email from Judge Alfred D. Swersky, Alexandria Circuit Court Judge, to Author (August, 2003) (on file with author). Judge Swersky described that “the return to the practice of law loomed large,” but that he never intended to change his interpretation of the law to appease legislators since that reversal would have been motivated by fear of losing his job rather than his own opinion. *Id.*

²¹⁹ See Shear & Davis, *supra* note 213.

²²⁰ See *id.*

²²¹ See Interview with Melinda Douglas, Public Defender for City of Alexandria, and Jim Lay, Assistant Attorney for Commonwealth of Va., in Alexandria, Va. (July, 2004) (on file with author). The Judicial Selection Committee of the Alexandria Bar Association follows established guidelines in interviewing, evaluating, and rating judicial candidates. Melinda Douglas and Jim Lay were both members of the Judicial Selection Committee.

²²² *Id.*

²²³ See Carla Branch, *Assembly Punts Nominees to Governor*, THE CONNECTION NEWSPAPERS, Mar. 10, 2004, <http://www.connectionnewspapers.com/article.asp?archive=true&article=29796&paper=59&cat=104>.

pointed Dawkins while the General Assembly recessed, they might later decline to approve him for a full term.²²⁴

While Judge Dawkins remains on the Juvenile and Domestic Relations Court in the 18th district, Judge Lisa Kemler, the runner-up in the bar vote who accepted a temporary appointment by Governor Warner in June, 2004,²²⁵ was appointed to the circuit court by the General Assembly in January 2005.²²⁶ A number of Alexandria Bar members describe Judge Kemler's appointment to the Circuit Court bench as a "horse trade" in the General Assembly which put Connie Frogale on the Juvenile and Domestic Relations Court in Alexandria.²²⁷

V. CONCLUSION

On February 19, 2003, the General Assembly filled twenty-five judicial vacancies without much controversy.²²⁸ Virginia Governor Mark R. Warner, a Democrat, criticized the Republicans in the legislature, stating "[i]t sure did seem to me that the process was not the unbiased and impartial process that we'd like to see in our judicial reappointments."²²⁹ Most of the grilling of judicial candidates about their political ideologies and past decision occurred in the House of Delegates.²³⁰ Despite encouragement from their colleagues to follow suit, for the most part, Republican state senators have declined to engage in such interrogation and instead consider only a candidate's qualifications.²³¹ Some have even expressed con-

²²⁴ See Shear & Davis, *supra* note 213.

²²⁵ Chris L. Jenkins, *Warner Makes New Pick for Circuit Court; Alexandria Judge Withdraws*, WASH. POST, June 8, 2004, at B01. Judge Kemler had been a substitute judge before her appointment, and she received an "exceptionally qualified" rating from the Alexandria Bar Association. *Id.* In the bar vote, she was runner-up to Judge Dawkins in what was described by members of the Judicial Selection Committee as "a close vote." *Id.*

²²⁶ Michael Lee Pope, *Kemler Takes Seat on Circuit Court*, ALEXANDRIA GAZETTE PACKET, Mar. 4, 2005, <http://subvatican.com/gazette/kemler.html>.

²²⁷ See *id.*; Branch, *supra* note 223. Frogale was a candidate for the Juvenile Court bench in a field of ten candidates. Branch, *supra* note 223. She received a "qualified" (one step above "unqualified"). *Id.* She did not win the bar vote; Barbara Beach, the only candidate who received a "highly qualified" rating, won the bar vote. *Id.*

²²⁸ See Tyler Whitley, *McClanahan to Fill Court Slot; Legislature Elects Judges*, RICHMOND TIMES DISPATCH, Feb. 20, 2003, at A-6 (showing that although the court slots were filled, the Democrats attempt to re-elect Askew failed).

²²⁹ Warren Fiske, *For First Time, Warner Strongly Criticizes GOP; He Faults Abortion Bills, Questioning of Judge*, VIRGINIAN-PILOT, Jan. 29, 2003, at A1.

²³⁰ Ginsberg & Shear, *supra* note 181.

²³¹ *Id.*

cern over the tactics employed by their counterparts in the House of Delegates.²³²

Due to the realities of the judicial appointment process in Virginia, a judge's actions and ideologies may be the determining factor in his or her reappointment.²³³ Overall, politics do motivate the judicial selection and reappointment process in the Commonwealth.²³⁴ The risks underlying reappointment cloud the virtues of the Canons. For instance, a judge seeking reappointment may opt to write opinions or reason according to a legislator's wishes, relying on that legislator's vote in the General Assembly. The risk of losing the large retirement benefit makes judges less likely to take a politically unpopular path in his or her decision-making, even if that path represents the appropriate legal decision. As a result, in order to protect his job and secure reappointment, a judge will rule on a politically sensitive case under the guise of impartiality, but in reality, decide the issue according to the wishes of the majority party in the General Assembly.²³⁵

Conversely, other judges follow the wisdom of the Canons²³⁶ and Bar Association doctrines and make decisions counter to majoritarian or legislative opinion by using fair and impartial adjudication. These judges' decisions are in stark contrast with the slew of conservative and ideologically based opinions issued in the Commonwealth and lead to a heightened scrutiny of the reasoning since they typically fall short of the conservative agenda.²³⁷ These decisions often cause alarm in the General Assembly because of the politically unpopular implications of "liberal" precedent.²³⁸ What this paper shows is that in Virginia, judges who care more about the impartial interpretation of the law, and less about the politics and

²³² *Id.*

²³³ See Ashley Taylor, *Judging the Judges-The Selection of a New State Supreme Court Justice Next Year Will Reveal Whether Virginia Has Been Corrupted by the Politicization of the Judicial-Approval Process in Washington*, BACON'S REBELLION, Oct. 28, 2002, http://www.baconsrebellion.com/Issues/10-28-02/Judges_aTaylor.htm.

²³⁴ See *id.* (stating that although the judicial selection process is "not as openly partisan and hostile as the process at the federal level, [it] is nevertheless an expression of political power").

²³⁵ This would be a case where a judge nearing the end of his term decided a case based on an obvious conservative agenda that was clearly poorly decided but the Assembly did not scrutinize the decision.

²³⁶ "A judge shall not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment. A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge." VA. SUP. CT. R. PT. 6, § III, Canon 2(B) (1999).

²³⁷ See generally Nuckols, *supra* note 151.

²³⁸ See *id.*

financial risks of counter-majoritarian thought, face the reality of a litmus test for Virginia reappointments which oftentimes results in a loss of job security and judicial retirement benefits.²³⁹

²³⁹ *See id.*